"If the question had arisen in England, I think some doubt might be entertained whether the obstruction as proved was such that a private person could sue without further proof of peculiar damage to himself . . .".

Now amongst the authorities there are cases when proof of inconvenience is sufficient to found a claim for general damages. There are other authorities which tend to show that in a case such as the present one the plaintiff should prove his peculiar damage just as in other cases where special damage has to be proved. The plaintiff has not in fact proved that he suffered any pecuniary loss or that his practice is affected. I may say something more about that further on.

Now in *Barber* v. *Penley*(2) a whole host of authorities are assembled by North J. and they are of general interest in considering the instant case but I will not go through them in detail.

Finally I would like to refer to the case of *Vanderpant* v. *Mayfair Hotel Co.*(3) When the Mayfair Hotel was built the plaintiff, who had a nearby private residence, complained that his access was obstructed and that he was deprived of reasonable use of the public highway and complained also of other nuisances. Now in that case the decision was that the plaintiff must prove that he has sustained particular and substantial and direct damage beyond the general inconvenience and injury to the public. The question on nuisances generally is very often one of degree. Now on the facts of this case I have come to the conclusion that plaintiff's access to his clinic has not been substantially interfered with. When a town becomes more busy owing to a variety of reasons, and the number of pedestrians increases, naturally one has to struggle through the crowd in order to get where one wants to go. That is the case in all cities. Next, I do not think that the council has exceeded its authority. I think that there was a reason for constructing this path and rail, namely to channel the pedestrians along a path of safety and to stop them mixing with wheeled traffic in the main highway. I do not think that the Municipal Council has exercised its powers unreasonably so as to invade the private rights of property, and finally, and I do think that this is material in this case, I do not find that the plaintiff has suffered any pecuniary damage.

In the circumstances the plaintiff's claim is dismissed with costs. I am grateful to counsel on both sides for putting their arguments so ably and succinctly.

Claim dismissed.

Solicitors: *Thomas & Co.; Battenburg & Talma.*

THONG SEONG POH & ANOR. v. THONG MENG TEE

[A.C.J. (Ismail Khan J.) July 22, 1966]

[Seremban — Civil Appeal No. 3 of 1964]

Landlord and Tenant — Statutory tenant — Tenant assigning his tenancy — Landlord entitled to possession — Costs.

This was an appeal against the decision of the president, sessions court, granting the respondent, the landlord of controlled premises, an order for possession of the premises against the appellants. The first appellant was the tenant of the premises but the respondent had given notice terminating the tenancy. Subsequently it appeared the first appellant transferred the tenancy of the premises to the second appellant.

Held: since the first appellant was a statutory tenant, he had only a personal right of occupation and could not assign this right and therefore the learned president was right in giving possession of the premises to the respondent.

Cases referred to:—

(1) *Samrose Properties Ltd.* v. *Gibbard* [1958] 1 W.L.R. 235.

(2) *R.* v. *Cook* [1959] 2 W.L.R. 616 at p. 622.

CIVIL APPEAL.

Edgar Joseph Jr. for the appellants.

Atma Singh Gill for the respondent.

Cur. Adv. Vult.

Ismail Khan J.: This is an appeal against the decision of the president of the sessions court at Kuala Pilah granting the landlord of controlled premises an order for repossession against a tenant holding over after due notice to quit.

The respondent, plaintiff in the action, was the owner of the premises No. 45, Main Road, Bahau, which he purchased in 1947. The first appellant was then already in occupation of a half portion of the ground floor as a shop and his family also resided therein. The second appellant is his son. They were both made defendants in the action.

In 1950 the first appellant applied to the Rent Assessment Board for reduction of rent and he succeeded in having it reduced from $37.50 to $32 per month.

On 7th July, 1951, the respondent served notice on the first appellant determining his tenancy. The latter replied on 9th July, 1951, that he was unable to find other suitable accommodation. The respondent was unable to take any action by reason of the Control of Rent Ordinance, 1948, then in force. Nevertheless, the effect of the notice was undoubtedly to convert the contractual tenancy into a statutory one — see section 15 of the 1948 Ordinance, now section 20 of Ordinance 1956.

The first appellant was trading under the firm name "Chip Thye". On 15th November,

1961, the *Sin Chew Jit Poh*, a Chinese newspaper, carried the following notice, the translation whereof (P1) reads:

"*Important notice.* Notice is hereby given that Tong Joo Tong of No. 40, Main Road, Bahau, is to be sold to Chip Thye on the 18th day of November, 1961. Those persons who have not yet cleared their current accounts with Tong Joo Tong are requested to settle them with Tong Joo Tong or its manager within 3 days failing which it is their own fault and no concern to Chip Thye the purchaser.

Chip Thye,
Bahau.

Dated 15th November, 1961."

It will be noted that the notice purported to have been inserted by "Chip Thye" stated therein to be the purchaser. The only person trading under that name was the first appellant. He stated in his evidence that he was aware of this notice, but the learned president disbelieved not only him but also his son, the second appellant, and his son-in-law. For my part, I am equally satisfied that a matter of such importance affecting the first appellant personally could not have been made the subject of a public notice without the consent of the head of the family. The premises referred to in the notice was No. 40, Main Road, an easy stone's thrown from No. 45. It was purchased, if the notice stated the truth, by "Chip Thye" the trading name of the first appellant, but the transfer according to D29 was registered in the joint names of his wife and married daughter on 26th August, 1961. It will be observed that the transfer preceded the newspaper notice by over two months and a half. I would therefore draw the conclusion, notwithstanding anything said to the contrary by the first appellant, that the notice did disclose the true state of affairs and that the purchase of No. 40, Main Road was in fact made by the first appellant and registered in the names of his wife and daughter for the same reason that he assigned his business at No. 45 to the second appellant, his son, on 9th October, 1959. To quote his own words:—

"When I die, my son will take my property. . . . . I was seriously ill, so I transferred the business to my son in order to avoid the trouble and expense of taking administration".

The daughter was working as a seamstress in Singapore. There is no evidence of any private source of income whereby the wife could have her own private means of purchasing a house. I am therefore satisfied that the purchase of No. 40 was made by the first appellant in the two names to save estate duty.

The learned president in his grounds of judgment appears to have very carefully weighed the evidence and to have taken into account the same points which I consider material evidence as to the true ownership of the premises and business at No. 40. I refer to the following passage:—

"Even though he contended that No. 40 belongs to his wife and daughter and also his son-in-law it is in fact a partnership. All the evidence adduced by the witnesses for the plaintiff and all the documentary evidence points to the fact that No. 40 and No. 45 are in fact a joint family business for there is a telephone extension at No. 45 from No. 40. Formerly his telephone was at No. 45. Further there were advertising cards jointly printed by No. 40 and No. 45 concerning the business at both premises. Even the names for the two shops are similar in Chinese character. In fact to all intents and purposes premises No. 40 and No. 45 are actually a joint family business. Despite every attempt made by defendant (1) and his son defendant (2) and his son-in-law (D.W.3) to negative these facts by advancing all sorts of flimsy grounds, I find that plaintiff has done more than prove his case to the satisfaction of the court in order to merit judgment in his favour".

Once these facts are clear — and I agree with the learned president's findings of fact — it follows as a matter of course that I should uphold his decision.

In my opinion the respondent is entitled to possession on three grounds.

First, the first appellant was a statutory tenant since 1959, having only a purely personal right of occupation. Such personal right is non-assignable. Once he had made an assignment to a third party which left him no personal right to remain in occupation by himself, the statutory tenancy is destroyed. P2 registered a change in partnership of the business of "Chip Thye" when the first appellant withdrew from the business on 9th October, 1959, in favour of his son. According to him, the second appellant is still the owner of the business in premises No. 45. The transfer was of course in absolute terms since it intended "to avoid the trouble and expense of taking administration". Counsel for the first appellant had argued that the transfer of the business did not include the tenancy. In this connection I would refer to the observation of Morris L.J. (as he then was) in *Samrose Properties Ltd.* v. *Gibbard* [1] at p. 245:—

"It seems to me that all that one can do in a case of this kind is to seek to ascertain what was the true nature and effect of the transaction; what was the substance of the matter; what was the reality of it, not being guided unduly by any labels that may have been used".

The court should certainly scrutinise with great care and attention any transaction, the sole object of which is to evade the Control of Rent Ordinance. To be sole proprietor of the business, the second appellant should have the sole and exclusive possession of the business premises. There was nothing in the evidence about a licence or sub-letting. Even the first appellant's wife left No. 45 and went over to live at No. 40. Only the first appellant hung on to the premises by continuing to sleep there and I have no doubt that he did so, and was responsible for the other manoeuvres purely to evade the provisions of the Ordinance for his own profit.

Moreover, it is a reasonable surmise that the second appellant as proprietor of the business paid the rent. There is no evidence at all that the first appellant paid the rent himself. Why should he for business premises occupied and used by the second appellant? The subterfuge is clearly shown up if one asks who paid the rent for No. 45.

The other two grounds on which possession was claimed fall under paragraphs (f) and (n) of section 12(1) of the Ordinance. The finding of the learned president, with which I agree, disposed of the question of "other accommodation" and suitable alternative accommodation. All that the first appellant would have to do is to remove his bed and rejoin his wife in No. 40. The questions of reasonableness and comparative hardship have also been decided in favour of the respondent. He had been denied for almost twenty years the use of his own premises. The first appellant does not, as tenant, use the half portion of No. 45 for his own business. The appellants have space in one and a half shop houses to carry on their trade, the respondent has only half a shop. The law in my view should not lend its assistance to do an injustice.

I am of the view that the second appellant was properly made a party in ejectment proceedings. The first appellant had forfeited his right to continue as statutory tenant by giving up his business premises to his son.

As to costs, it is clear that the learned president had overlooked section 13 and his order for costs was not made in the exercise of his discretion. However, I feel certain that had he been reminded, his discretion would have been exercised in the respondent's favour. In any event, I propose to exercise my discretion to order the appellants to pay the costs of the action. On this point, I would refer to the case of *R.* v. *Cook*,[2] at p. 622, where Devlin J. (as he then was) said:—

"It is well settled that this court will not interfere with the exercise of a discretion by the judge below unless he has erred in principle or there is no material on which he could properly have arrived at his decision. But in this case we are not satisfied that the learned chairman really exercised his discretion at all. He allowed the questions to be put because he thought that counsel was strictly entitled to do so, although he, the chairman, queried whether it was necessary. Accordingly, it falls to us to exercise our own discretion in the matter".

The appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *Joseph & Son; Atma Singh Gill.*

NG FOOK HIONG v. ARUNACHALAM CHETTIAR

[A.C.J. (Ismail Khan J.) July 22, 1966]

[Seremban — Civil Appeal No. 2 of 1966]

Landlord and Tenant — Premises sublet by tenant — Default judgment against subtenant — Application to set aside judgment — Whether applicant has disclosed defence on merits.

Practice and Procedure — Default judgment — Setting aside — Consideration of defence on merits.

The respondent, the owner of controlled premises, brought an action claiming possession of a part of the premises occupied by the appellant. The appellant did not file any defence and did not appear at the trial, as she was unwell. Judgment in default was entered against her and she subsequently applied to set aside the judgment. The learned president of the sessions court refused to set aside the judgment as he said "besides failing to file a statement of defence, the applicant has no defence to contest the claim".

Held: the learned president should have considered whether the appellant in her application had disclosed a defence on the merits and as it was clear from her affidavit that she claimed to be a subtenant of the premises, the default judgment must be set aside.

Case referred to:—

(1) *Evans* v. *Bartlam* [1937] A.C. 473.

CIVIL APPEAL.

Edger Joseph Jr. for the appellant.

W. H. Sault (*John Ang Soon Ho* with him) for the respondent.

Cur. Adv. Vult.

Ismail Khan J.: The respondent, the owner of controlled premises known as No. 21, Lister Road, Kuala Pilah, (hereinafter called the premises) commenced an action in the sessions court at Kuala Pilah against the appellant claiming possession of a part of the premises, namely, half of the ground floor and one room in the front floor thereof (which part is hereinafter referred to as the said part) and damages for trespass.

The summons was served on the appellant on 16th May, 1964, but was not set down for hearing until 11th December, 1964. No defence was filed. On the day of the hearing the appellant failed to appear but had sent her sister to inform the court that she was unwell and to apply for a postponement which was refused.

The respondent then proceeded to prove his case. He said in evidence that he had obtained an order of ejectment against a tenant of the premises, one Kow Guan, early in 1963. I pause to observe that the order for possession was obtained as the tenant was in arrears of rent. On 20th February, 1963, the respondent received a notice from the appellant that she was a subtenant of the said premises. He replied that he could not recognise her as a sub-tenant as the former tenant, the sole occupant of the premises, was prohibited from subletting the premises or